EXHIBIT 11
DATE 2-9-07
HB 138 & 373

HB 138 AND HB 373
House Natural Resources Committee
Testimony of Stan Bradshaw
Trout Unlimited, Montana Water Project
February 9, 2007

Background. In 1993, the Montana legislature closed the upper Missouri River basin—all the river and its tributaries above Morony dam—to most new permits for surface water uses. Specifically it said, " the department [of Natural Resources and Conservation] may not *process or grant* an application for a permit to appropriate water or for a reservation to reserve water within the upper Missouri River Basin until final decrees have been issued [in the adjudication]." [emphasis added] One of the exceptions to this clsoure was for groundwater that was "not immediately or directly connected to surface water." In other words, if ground water was "immediately connected to surface water," a prospective water user could not even apply for a permit. The Montana legislature also closed the Teton River basin to new surface water uses in 1993, with the same limitation on groundwater pumping not being allowed if it is "immediately or directly connected to surface water."

Part of the rationale for closing these basins is that they are fully appropriated. One of the effects of the closure was to protect existing water rights holders by eliminating the need to spend substantial resources objecting to proposed new uses in a basin that is already over-appropriated. Because the basin is fully appropriated, any new depletions automatically have an adverse effect on existing water rights. DNRC, however, interpreted the term "immediate or direct" to mean that if a well pulls water directly from a stream (known as "induced infiltration"), it was immediately or directly connected to the stream and therefore a permit application could not be processed. If a well simply intercepted groundwater on its way to the stream, according to DNRC, it was not immediately or directly connected and the permit application would be processed, necessitating objection by existing water users.

In 2003, Trout Unlimited and a number of irrigators and landowners in the Smith River basin challenged DNRC's interpretation of "immediately or directly connected" in court, as improperly broadening the groundwater exception to the closure. In April 2006, the Montana Supreme Court agreed with the plaintiffs, holding that DNRC's interpretation, by confining the definition of "immediate or direct" to induced infiltration and ignoring groundwater that was captured before it got to the stream, was too narrow and did not protect senior water users as the law intended.

Practical Effect of TU v. DNRC. The practical effect of the Supreme Court's holding is mixed. First, because the closure for the upper Missouri had exceptions for domestic and municipal use, proposed new uses for subdivisions development can continue to be reviewed. But proposed new groundwater irrigation uses, not being exceptions under the closure, could not even apply unless the applicant could show that the groundwater is not connected to surface water. And, under the current language of the closure statute, a prospective applicant who doesn't come under one of the exceptions to the closure cannot even offer a plan to mitigate depletions. So TU v. DNRC may have resulted in DNRC processing fewer applications for new uses in the upper Missouri basin than before the ruling, although there are many new applications for new groundwater pumping to serve subdivisions in places like the Gallatin valley.

House Bill 138.

HB 138 is the result of a sixteen-month effort by a working group of diverse interests convened by DNRC Director Mary Sexton. HB 138 is based on the principal that, in a closed basin, any depletion to surface waters should be considered an adverse effect. It requires a hydrologic study of any proposed new groundwater permit, and if the study indicates depletion to surface water, it requires the submission of an augmentation plan before the application can even be processed. The idea is to accommodate new uses without jeopardizing existing rights and without exposing existing right holders to an endless barrage of new applications to have to challenge through objections.

HB 138 addresses groundwater use in all closed basins, whether closed by rule or closed by statute. Here are the specific changes it proposes:

- It removes the limitation of "immediate or direct connection" from the definition of "groundwater." "Groundwater" in closed basins will simply be "water beneath the ground surface." With that definition in place the bill does the following:
- Only allows the processing of an application for a groundwater permit in a closed basin that is accompanied by a hydrologic report and an augmentation plan to mitigate for any depletions to surface water. In addition to this exception for groundwater HB 138 recognizes certain limited exceptions to the closure, including:
    - surface water for non-consumptive hydropower use,
    - surface water for use by a municipality
    - surface water for stockwater use,
    - stored water during high spring flows in an impoundment with a capacity of 50 acre-feet or more;
    - temporary emergency appropriations necessary to protect lives or property;
    - an application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required for: remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act
- It does not provide an exception for domestic use or municipal use outside of a municipality;
- An augmentation plan must show that there will be a reasonable flow replacement in the reach affected of water to be consumed by the proposed new use.

Practical Effect of HB 138. What is the practical effect of this bill on the existing water right holder in closed basins?

- It means that you may see more applications for new use processed than under the current law as affected by **TU v. DNRC**, but still less than under DNRC's old interpretation of "immediate or direct."
- It means that any applicant for a new groundwater use is going to have to provide a method for mitigating any depletions, or DNRC won't even process the application. This means that even when an application is publicly noticed for objection by senior users, it will have been reviewed to see how it mitigates any depletions of surface flows.
- It means that, if an irrigator wants to seek a permit for groundwater irrigation he can, as long as he provides an augmentation plan to avoid depleting flows in the source, or can show that the source is not connected to surface waters.

- This bill places a greater burden of proof on applicants for new water uses in closed basins than exists in basins that are not closed to new uses.
- The status quo under **TU v. DNRC** allows new groundwater pumping to serve subdivisions (because "domestic" and "municipal" uses are exceptions to the basin closure), and DNRC's practice to date is only to require augmentation if objectors show an "adverse effect." HB 138 would require an augmentation plan up front for subdivisions relying on new groundwater pumping, without requiring senior water users to object to every new application.
- If the hydrologic report demonstrates that there is no depletion to surface waters, an augmentation plan will not be necessary.

HB 138 is a reasonable balance between the need to protect existing surface water rights and the desire of people to apply water to new uses. Therefore TU urges the committee to pass HB 138.

House Bill 373

In closed basins there has been a presumption in reviewing applications for new uses that surface water depletion has a calculable adverse effect on other users because the basin is fully appropriated. In other words, even if you can't precisely measure the adverse effect, because the basin is fully appropriated, there is a strong presumption that additional depletions to the source gives rise to an adverse effect. HB 373 would reinstate the induced infiltration test that the court threw out in **TU v. DNRC** and it would also remove the presumption in closed basins that surface water depletion equals adverse effect.

Specifically, it would:

- It would reinstate the definition of "induced infiltration that DNRC applied before **TU v. DNRC** to allow any groundwater permit application to be processed in a closed basin when a well does not draw water from a surface water body during pumping.
- In the criteria for issuance of a new permit, it would allow a permit to be issued in a closed basin even if there is a depletion of stream flows if "the prior appropriator can reasonably exercise the water right under changed conditions."
- It would require a report addressing the effect of a proposed groundwater appropriation on other water rights "within the area of influence" of the proposed development only if the well induces infiltration of surface water.
- The bill would only require an augmentation plan when DNRC finds that a well inducing infiltration will have an adverse effect on specific existing water rights.
- The bill would apply only to basin closures in the upper Missouri and Teton River basins.

Practical Effect of HB 373. The practical effect of HB 373 on existing water rights in closed basins would be as follows:

- **More new permits.** An existing water right holder will see more permits processed in closed basins than are being processed under **TU v. DNRC**, and more than would be processed under HB 138 described above.
- **Death by a thousand cuts.** HB 373 will increase the burden on objectors in closed basins by requiring irrigators to show specific harm at the headgate from a proposed new use. Because it may be difficult in many instances to show specific harm, an existing water right holder will likely have a much higher (and more expensive) bar to clear to show harm. In addition, the existing user runs the risk of death by a thousand cuts—the slow, incremental erosion of the existing right over time by a steady proliferation of new uses, no one of which rises to the level of harm required by HB 373 but which, collectively impose real harm. In effect, this bill will largely nullify the basin closure as it applies to groundwater development.
- **Up-Front Augmentation Required Only in The Most Egregious Situations.** HB 373 requires mitigation—or augmentation for the new groundwater pumping—with the groundwater application only in the most egregious situations. In the language of the bill, where "induced infiltration prevents the senior water user from reasonably exercising their right." This means that the new groundwater pumping might as well reach over and shut off the senior users' head-gate, since it essentially requires taking the water right out of the creek where the senior user's diversion lies. For all other situations where the new groundwater pumping depletes the flow in a creek, but to a lesser extent, the senior user must object and prove that his water right is harmed.
- **Requires Objection After Objection to Protect Senior Rights.** Because HB 373 requires the new groundwater applicant to mitigate up-front in only the most extreme situations, existing water right holders will have to file objection after objection to protect

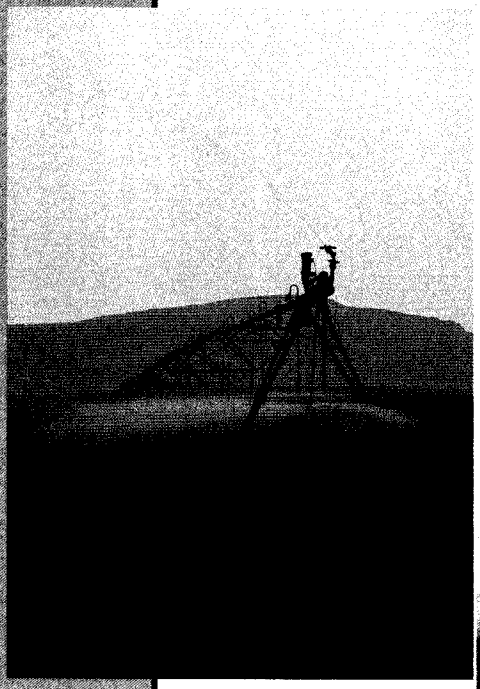
their water rights, or experience their water being taken away one new groundwater pump at a time.

Based on the effects described above, TU urges the committee to vote "do not pass" on HB 373.

Thank you for your attention to this issue.

TROUT UNLIMTED

Groundwater Train wrecks in Colorado and Idaho



The year 2006 was a rude awakening for groundwater pumpers in Colorado and Idaho. Decades of pumping finally caught up with them, as their impacts to river flows reached the breaking point. Now Colorado and Idaho are in disarray. They are struggling to repair the damage to their agricultural economies and address the lives of the disrupted and disillusioned who thought they had water, and are now finding that they don't.

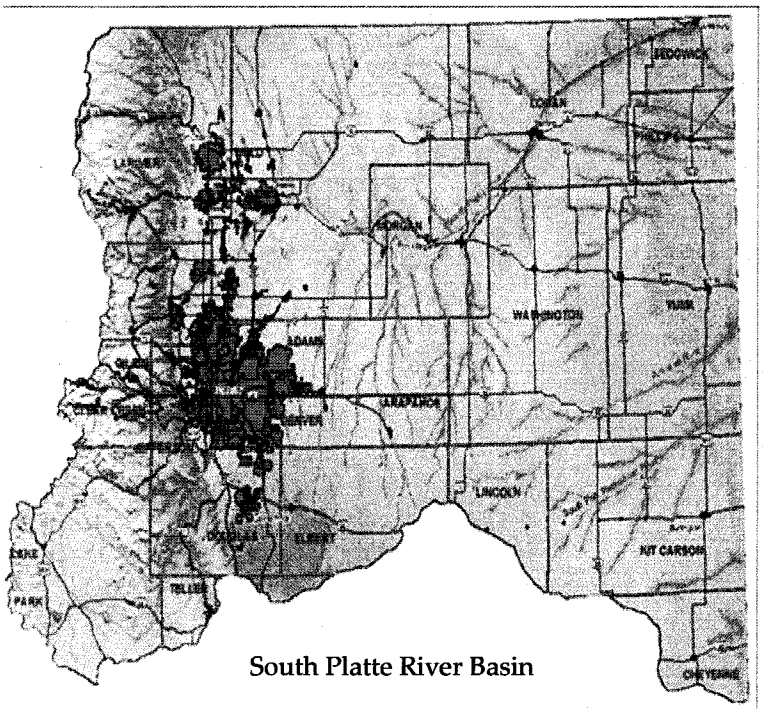
Colorado

In April 2006 the Colorado State Engineer, Hal Simpson, making what he called "the toughest decision I've ever had to make," shut down 440 groundwater wells irrigating 200 farms across 30,000 acres along the South Platte River. Why?

The groundwater irrigation well owners hadn't come up with "augmentation plans," or a way to protect senior surface water rights holders from the river depletions caused by their groundwater pumping. The senior water right holders included several of Colorado's oldest irrigation ditches like the St. Mary's.

Colorado (cont.)

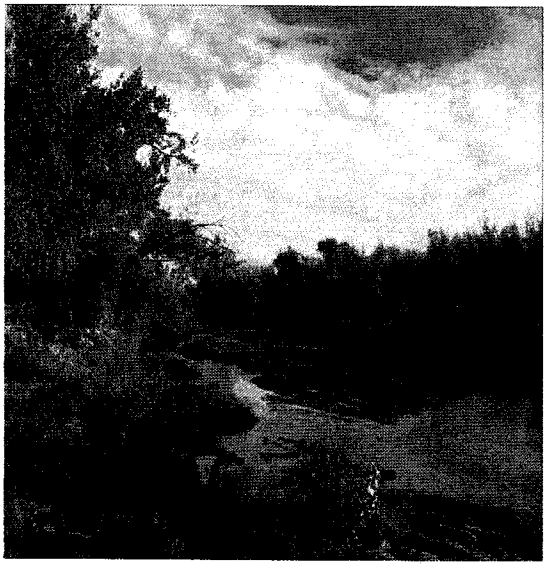
The problem started with the devastating 2002 drought, when senior surface water irrigators watched their fields burn up while groundwater pumpers continued irrigating. The seniors fought back with a lawsuit against the State for allowing deep irrigation wells to harm Platte River flows. The Colorado Supreme Court ruled in favor of the seniors, finding that a 1969 Colorado law should have required the groundwater pumpers to prevent harm to the flows needed by senior, surface water users.



South Platte River Basin

After The 2002 Drought

In 2002, there were approximately 5,000 wells pulling water from the aquifer that feeds the South Platte River. By 2006, several hundred well-owners had developed the required "augmentation plans" by finding surface water sources to dedicate to river flows. $21 million has been spent on the augmentation plans to date, but even so, 1,500 wells have been shut down for not being able to come up with replacement surface water.


South Platte River, Colorado

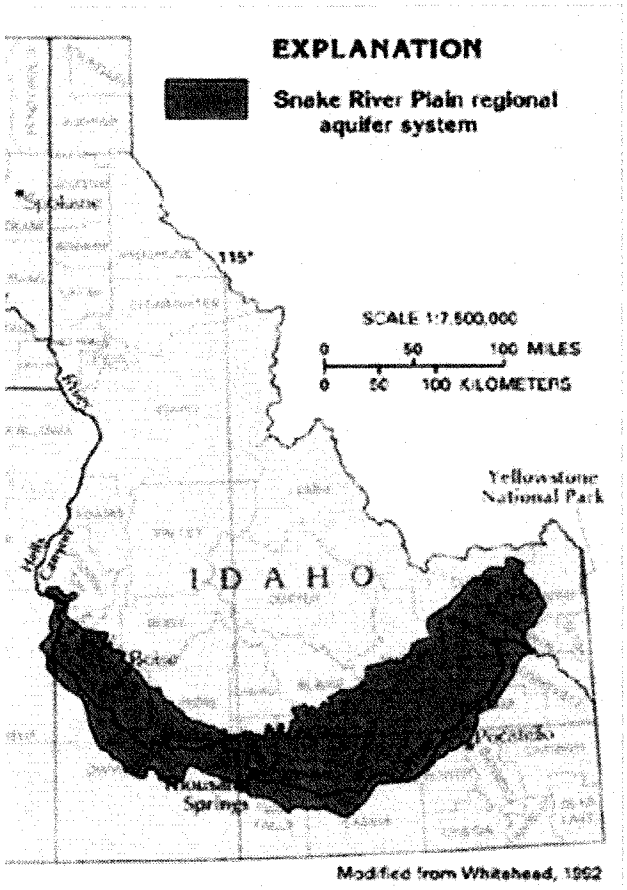
A Dry 2006

When the spring of 2006 again turned extremely dry, the State Engineer was forced to act against the well owners who still did not have augmentation plans in place. These well-dependent farms and families had expected to be allowed to pump 15% of their water during the 2006 season, and planted accordingly. With precipitation nearly 3 inches below average, their wells shut off, and the seniors unwilling to relent, farmers were forced to watch their crops wither and face hundreds of thousands of dollars in losses. For some, this will mean bankruptcy, despite Colorado Governor Bill Owens releasing $1million from the State's Ag Drought Response Fund.

While Colorado's system--on paper--should have prevented this catastrophic event, it did not. Many see this catastrophe as an example of the increasing tension between ground and surface water users throughout Colorado.

Idaho

Idaho faced similarly rough sledding last year, with a problem of even greater magnitude. Groundwater irrigation over the vast Snake River Plain aquifer is in trouble—all 10,000 square miles and hundreds of thousands of irrigated acres of it. As in Colorado, the groundwater pumping's depletion of Snake River flows have prevented senior, surface irrigators from getting their water.



Surface Water Users Fight Back

Over a decade earlier, in 1994, Idaho recognized that the groundwater pumping was depleting flows. The State came up with "conjunctive management rules" (CMR's), that were supposed to address the depletion of Snake River flows. Despite the CMR's, the seniors were still not getting their water, so they went to court. In June of 2006, Idaho District Court Judge Wood (in a 127-page, exhaustive opinion) threw out the CMR's, saying that they were unconstitutional for failing to protect senior, surface water rights.

Snake River, Idaho

Idaho's Crisis

Now Idaho doesn't know what to do. Its rules to protect Snake River flows are unconstitutional, senior water users are hopping mad, and Idaho still has hundreds of thousands of acres being irrigated with groundwater. The only thing that is certain is that—at this point---there is no easy way out.

What are Colorado's and Idaho's Lessons for Montana?

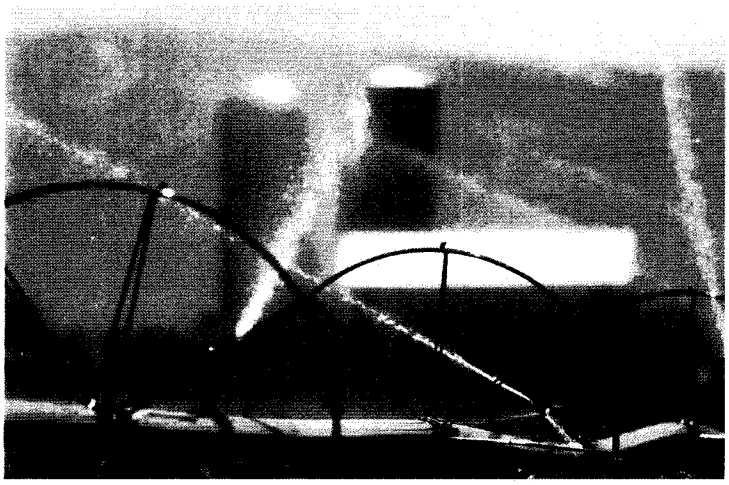
Montana is headed for the same crises that Colorado and Idaho have experienced, if we can't learn from their mistakes. The expensive, painful lesson from Colorado and Idaho is that groundwater pumping's depletions to river flows must be addressed before the pumping begins.

HB 373 ignores this lesson from Colorado and Idaho. In the Upper Missouri and Teton River closed basins, where there is already a recognition that these basins is fully appropriated, HB 373 turns a blind eye to river depletions from new groundwater pumping. Instead, HB 373 offers the same model that failed Colorado and Idaho so miserably. Like Idaho and Colorado's failed models, HB 373 only requires new groundwater pumping to mitigate its harm to river flows if a specific downstream, senior water user can no longer "reasonably exercise" his water right. Small, incremental depletions fall through the cracks.

Idaho Potato Field

HB 373 also ignores Idaho's and Colorado's lesson of preventing harm. Idaho and Colorado waited until senior surface-water irrigators, with some of the oldest water rights, were forced to watch their fields burn up for lack of water before "foul" was cried. Idaho and Colorado also forced senior users to the courts, as a solution of last resort. HB 373 puts Montana on the same train-wreck track.

Instead of preventing harm to river flows, HB 373 adopts an attitude of "catch me if you can" for new groundwater pumping. It forces, just as Colorado and Idaho did, senior surface water users to object to new groundwater pumping in order to obtain meaningful mitigation for the harm to their surface rights. HB 373 forces the harm from groundwater pumping into contested case hearings and court cases, instead of addressing it up front. HB 373 puts Montana's closed basins on the same track as Colorado and Idaho---into groundwater train wrecks where everyone loses.



Trout Unlimited

Mark Aagenes
PO Box 412
432 Last Chance Gulch
Helena, MT 59624

(406)449-9933

Stan Bradshaw
PO Box 412
432 Last Chance Gulch
Helena, MT 59624

(406)449-9922